

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-89-0062 WBS GGH P

vs.

MICHAEL L. MONTALVO,

Movant.

ORDER RE: CERTIFICATE OF
APPEALABILITY

By facsimile transmission to this court, on or about October 29, 2007, the Ninth Circuit ordered that the district court grant or deny a COA on the latest in a series of appeals by Mr. Montalvo. Montalvo's Notice of Appeal filed August 15, 2007 specified:

"[Montalvo] appeals from the Order [August 7, 2007] Dismissing Montalvo's Amended Motion to Correct an Illegal Sentence Pursuant to Federal Rule of Criminal Procedure 35(a)(1985) filed May 4, 2007.

On that same day, this court required Montalvo's counsel to request a COA specifying the issues on appeal which he thought worthy of consideration.¹

¹ The Order of this court requiring specification of issues mistakenly listed the March 23, 2007 Findings and Recommendations adopted by Order of May 30, 2007 as the order appealed. Montalvo has not appealed from the denial of his § 2255 motion brought erroneously as a Fed. R. Civ. P. 60(b) motion. Of course, this clerical error in the district court's order directing Montalvo to respond does not affect the validity of the Ninth Circuit order.

1 Montalvo contests the Ninth Circuit's order requiring a COA because he believes
2 no such COA is necessary when appealing from a Rule 35(a) determination. While Montalvo
3 may, or may not, be correct, the Ninth Circuit has ordered a COA from the appeal filed August
4 15, and this court has no authority to do anything but rule upon a COA.

5 Montalvo asserts in the alternative that all of the issues he raised in his purported
6 Rule 35(a) motion should be granted a COA. However, this court did not rule on the merits of
7 such claims; rather the Rule 35(a) motion was dismissed as improvidently made. That is,
8 Montalvo's Rule 35(a) motion was simply a repeat of issues he had raised before concerning
9 alleged trial errors and the motion did not attack the substance of the sentence; also, Montalvo's
10 attack on the manner in which the sentence was imposed was also found non-actionable. Having
11 not reached the merits of Montalvo's Rule 35(a) motion, the district court cannot, of course,
12 order a COA on issues not reached. Therefore, Montalvo's request for COA on the merits of his
13 Rule 35(a) motion is denied.

14 The court will issue a COA, to the extent one is appropriate or necessary, on
15 Montalvo's procedural claim that any trial error which affects the sentence, or any error in the
16 manner in which the sentence is imposed (as opposed to the substance of sentencing error *per se*)
17 affects the "legality" of the sentence and was cognizable under Fed. R. Crim. P. 35(a) (1985) in
18 effect at the time of Montalvo's sentencing.

19 The Clerk shall transmit a copy of this order to the Court of Appeals.

20 IT IS SO ORDERED.

21 DATED: November 21, 2007

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23 WILLIAM B. SHUBB
24 UNITED STATES DISTRICT JUDGE

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